No. 81-2332

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In the Supreme Court of the United States

October Term, 1982

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,
a political subdivision of the Commonwealth of Virginia,
Petitioner,

v.

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,
Respondent.

BRIEF OF THE AMICUS CURIAE, THE CITY OF NORFOLK, VIRGINIA, IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether Congress, in passing the Uniform Relocation Act of 1970, intended to completely abrogate the universal common law rule that utilities bear the expense of relocating their facilities from public rights-of-way, thus placing a heavy financial burden on already beleaguered cities by including utility companies within the broad definition of "displaced persons" entitled to receive relocation expenses, despite the total lack of any indication of congressional intent to make such a drastic change.

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THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
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BRIEF OF THE AMICUS CURIAE, THE CITY OF NORFOLK, VIRGINIA, IN SUPPORT OF THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

INTEREST OF THE AMICUS CURIAE

This brief is filed on behalf of the City of Norfolk, Virginia, by its duly authorized legal officer pursuant

to Rule 36.4 of this Court. Petitioner, the Norfolk Redevelopment and Housing Authority [NRHA], has undertaken numerous federal- and city-financed urban renewal projects in Norfolk. The decision below that NRHA must pay Respondent Chesapeake and Potomac Telephone Company [C & P] for relocation costs that may reach a million dollars with interest for removing its facilities from streets affects the city directly. Although NRHA is a political subdivision of the Commonwealth of Virginia, independent of the city, any liability NRHA incurs ultimately will be borne by the city.[1] Even if NRHA paid the judgment itself, it would do so from money otherwise available for redevelopment projects in Norfolk.

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[1]The Department of Housing and Urban Development [HUD] is no longer a party herein because its funds for the projects have long since been expended.

Norfolk has been a showcase for urban renewal projects. From a decaying Southern port city, unable to adjust to the burgeoning presence of the Navy following World War II, it has been rebuilt into a model for what federal funds, a committed citizenry, and local business initiative can achieve. Payment of this judgment, as well as of potential retroactive claims for all utility dislocations since 1970, could do much to stymie this remarkable progress as well as that of numerous other cities reborn with federal funds. Those funds, already sharply curtailed by recent budget cuts, will be further depleted, to the detriment of cities nationwide, by any unexpected obligation to repay the enormous costs of moving utility facilities from streets.

STATEMENT OF THE CASE

Appellant C & P sued NRHA and the

Secretary of HUD in the United States District Court for the Eastern District of Virginia for relocation costs under the Uniform Relocation Assistance and Real Property Acquisitions Policies Act [URA], 42 U.S.C. §§ 4061 et seq., and the corresponding Virginia act, Va. Code Ann. §§ 25-235 et seq. C & P claimed it was a "displaced person" under the URA, entitled to reimbursement for the cost of moving its underground telephone lines and equipment, at the city's request, for closing or improving streets in areas acquired for NRHA projects. C & P's franchise with Norfolk, however, provided that C & P would pay for relocating its facilities at the city's request. Although neither C & P nor any other utility company had ever asked reimbursement in Virginia under the URA before the instant suit, the city is aware of

numerous claims brought since the Fourth Circuit's opinion four months ago.

C & P's claim was made first to NRHA, reviewed, and denied. After that denial was upheld by HUD's area office, C & P filed suit in District Court. That court found no liability under the URA and denied all C & P's claims in a June 4, 1981, Memorandum Opinion. (Appendix B.) C & P appealed to the Fourth Circuit, which reversed the lower court on March 25, 1982, declaring C & P a "displaced person" entitled to relocation benefits under the URA. (Appendix A.) The City of Norfolk asks this Court to grant NRHA's petition for certiorari to review that opinion.

REASONS FOR GRANTING THE WRIT

This Court should review the appellate decision because it concerns an important federal question, not yet

decided by this Court, on the scope of reimbursement under the umbrella statute, URA; is based on a completely erroneous statutory interpretation that reads the URA as acting in total derogation of the common law, despite the lack of any indication of congressional intent to do so; is contrary to decisions by every state and federal court that has considered the issue, creating a conflict between the Fourth and Sixth Circuits; and will have a devastating, nationwide economic impact on cities if allowed to stand.

The issue presented, not yet resolved by this Court, deals with an important federal statute. The reach of the URA is very broad: it governs reimbursement to those displaced by almost all federally run or funded projects except for highways. This Court has examined it only a few times, most

recently in Alexander v. HUD, 441 U.S. 39 (1979), which makes clear that the Act is not intended to reimburse everyone displaced in any manner by a federally assisted program. The potential claims of utility companies under the Act since 1970 could reach billions of dollars.

The Fourth Circuit's opinion ignored a classic rule of statutory construction and thereby completely overturned the common law. The common law in Virginia and almost all states is that utility companies are not reimbursed for removing their facilities from public streets upon request of the city because they have no property rights in public rights-of-way. The city grants them the right to place their facilities in public streets on condition that they relocate those facilities at the city's

request.[2] C & P's 1898 franchise agreement with Norfolk, under which its telephone lines and other equipment were installed, is consistent with the common law in obliging C & P, on request, to move its facilities at its own cost. As stated by the California Court of Appeals:

> . . .[I]n the absence of a provision to the contrary, it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets.

Pacific Telephone & Telegraph Co. v. Redevelopment Agency, 151 Cal. Rptr. 68, 69, 87 Cal. App. 3d 296 (1978). Accord, Chesapeake & Potomac, supra.

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[2] Chesapeake & Potomac Telephone Co. v. Landrieu et al., No. 79-906-N (U.S. D.C., E.D. Va., June 4, 1981) & cases cited therein. (Appendix B.)

The classic rule of construction is that a statute will not be interpreted to act in complete derogation of the common law, absent a clear indication of legislative intent to do so. Ignoring that rule, the Fourth Circuit gave a literal reading to the Act's broad definition of "displaced persons" as including utilities because it found no indication one way or the other of whether Congress intended to include them. In contrast, the District Court correctly construed the statute, id.:

> In the adoption of the Uniform Relocation Act of 1970, if Congress chose to abrogate such a well known common law principle, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act or in its legislative notes and history.

The error of the Fourth Circuit's

reading is highlighted by one stated basis for its decision: the URA was in complete derogation of the common law as to tenants-at-will, providing relocation payments for such tenants, reasoned the court, and therefore it must similarly abrogate the common law as to utilities. That logic ignores the vital distinction that the Act itself expressly provides for payments to tenants-at-will and does not mention utilities. The inclusion of tenants-at-will in the URA in fact reinforces the city's point: that when Congress reversed the common law as to tenants-at-will, it did so by specifically including them in the URA, which it did not do for utilities.

Not only do the Act itself and its legislative history contain no reference to utilities, which fact should leave the common law intact, but the context of that history clarifies congressional intent to

exclude utilities from URA benefits. The URA attempted to redraw the complex puzzle of diverse statutes and rules governing reimbursement to those displaced by federally aided programs and replace them with a uniform system of payments. Alexander v. HUD, supra. It was not intended to create a new cause of action in utilities, in contrast to the specific provision for reimbursements for displaced utilities under § 123 of the Federal Aid to Highways Act of 1958, 23 U.S. § 123, one of the few provisions not repealed by the URA.[3] Section 123 authorizes reimbursements for

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[3] The inclusion of utilities in a later act makes it even clearer that URA was not intended to include such benefits. The District of Columbia Redevelopment Agency was listed in the URA as a state agency required to make displacement payments, yet Congress enacted a statute specifically providing for relocation reimbursements to utilities in the District of Columbia. D. C. Public Utilities Reimbursement Act of 1972, Pub. L. No. 92-495. Had the URA already so provided, that law would have been unnecessary.

the cost of relocating utility facilities displaced by highway projects utilizing 90% federal funding.

The District Court in this case pointed out that a legal controversy over those payments in Virginia during the debate over URA "raised a real furor of intense and vocal interest" of which Congress certainly was aware:

> This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the Relocation Act of 1970 was before the Congress.

Chesapeake & Potomac, supra.

The primary purpose of URA, to alleviate the "inequitable burden" and "catastrophic results" of redevelopment programs on "a few citizens," especially poor nonwhites and small businesses, House Report No. 91-1656, reported in 1970 U.S. Code Cong. & Adminis. News at 5850-5852, would not encompass aid to large corporations

like C & P, whose rate structure allowed it to recapture its costs of doing business such as removing its facilities from streets.

HUD also believed that the URA did not authorize relocation payments to utilities and therefore never revised the guideline it promulgated prior to the URA denying them payments, Urban Renewal Handbook RHA § 7209.1, despite the URA's directive to all agencies to issue any new guidelines necessary to implement the Act.

Every court, including the Sixth Circuit, that has considered this subject has taken a position contrary to that of the Fourth Circuit.[4]

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[4] In addition to the state cases cited in Petitioner's Brief at 13 n. 4, the decisions of all four federal courts that have confronted the issue are opposed to that of the Fourth Circuit: Consumers

(Continued)

Two cases deal with almost identical facts. In Mountain States Telephone & Telegraph Co. et al. v. Boise Redevelopment Agency, No. 52891 (D.C. 4th Jud. D. Idaho, October 27, 1980), the Idaho court wrote:

> Given the stated intent of Congress to unify and coordinate the various federal relocation assistance programs, the state of the common law, and the consequent failure of Congress to clearly provide for the needs of the public utilities and their relocation requirements, it is the opinion of this Court that the U.R.A. was not intended to include within its coverage the reimbursement sought by the plaintiffs in this action.

In Pacific Telephone and Telegraph, supra, the California Court of Appeals

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[4] (Cont.)
Power Co. v. Costle, 615 F.2d 1147, 1149 (6th Cir. 1980), aff'g, 468 F. Supp. 375 (E.D.Mich. 1979); Lone Star Gas Co. et al. v. Landrieu, No. 80-100-C (U.S.D.C., E.D. Okla., March 30, 1981); Public Service Co. v. Harris, No. 79-C-37-3T (U.S.D.C., N.D. Okla., August 22, 1980).

wrote of the state version of URA:

> Appellant contends that these definitions are all inclusive and that appellant fits within them . . . [and] that since no provision of the Relocation Assistance Law specifically excludes reimbursement of utility costs, the broad general definitions indicate a legislative intent that the common law does not apply.
>
> We disagree. An attempt to exempt utilities from the common law cannot be inferred merely from the broad general definitions used in the Relocation Assistance Law.

Pacific Telephone, supra, at 70-71 (emphasis supplied) (citations omitted).

The Fourth Circuit's decision would have a disastrous impact on cities all over the country. The consequences are potentially devastating for cities, already hard hit by cuts in federal funds, diminishing tax bases, the increasing cost of social programs, the growing number of social-welfare beneficiaries, and the threat of even more local burdens

under the New Federalism policies. Retroactive claims could reach billions of dollars. The potential liability for the City of Norfolk in this case alone could reach one million dollars with interest calculated from the mid-1970's. The future worth of federal funds for community development projects will be substantially lessened, hampering the ability of older cities to maintain themselves solvent financially by redevelopment projects to lure industries and businesses from the suburbs and Sunbelt cities. The money needed to fulfill cities' obligations to utilities companies may mean the difference between economic viability and financial distress.

It would be ludicrous to believe that Congress in 1970, aware of the worsening plight of cities, intended to put such an economic burden on those cities most

in need of community development funds, a burden that does not benefit the urban poor and small businesses Congress sought to aid with the URA and that could add appreciably to the danger of financial collapse of cities.

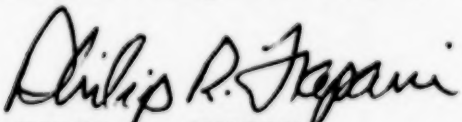
Finally, we have been authorized to represent that the same problem existing in Norfolk exists for most of the sixteen hundred (1,600) cities which retain membership in the National Institute of Municipal Law Officers (NIMLO) and is considered by that organization as a matter of great national significance.

CONCLUSION

The United States Supreme Court should grant certiorari in this matter because the decision at issue treats an important federal statute as acting in complete derogation of state common law without a clear congressional intent to

do so, reverses the usual rule of statutory construction, is contrary to decisions of all other state and federal courts that have dealt with the issue, and will place an unexpected and an unplanned-for economic burden on already besieged cities throughout the country.

Respectfully submitted,



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(Appendices to follow)

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1982, three copies of the foregoing Brief Of The Amicus Curiae, The City Of Norfolk, Virginia, In Support Of The Petitioner's Petition For A Writ of Certiorari were mailed, postage prepaid, to each of the following:

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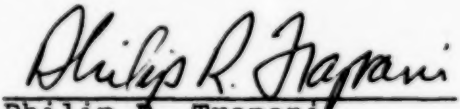
I further certify that all parties required to be served have been served.



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1602

The Chesapeake and Potomac
Telephone Company of Virginia,

Appellant,

versus

Moon Landrieu, in his official
capacity as Secretary of Housing
and Urban Development,

and

Norfolk Redevelopment and
Housing Authority,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. John A. MacKenzie, District Judge.

Argued December 7, 1981

Decided March 25, 1982

Before HAYNSWORTH, Senior Circuit Judge, RUSSELL and WIDENER, Circuit Judges.

Joseph L. Kelly, Jack E. Greer (Williams, Worrell, Kelly and Greer on brief) for Appellant; Francis N. Crenshaw (Ann K. Sullivan, Crenshaw, Ware & Johnson; Justin W. Williams, United States Attorney, Michael L. Rhine, Assistant United States Attorney; Sonia C. Jaipaul, John R. Abbot, Peter M. Campanella on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

The questions are whether a utility company can qualify as a "displaced person" under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 84 Stat. 1894, 42 U.S.C. §4601 et seq., and whether the plaintiff, Chesapeake & Potomac Telephone Company (C&P), qualifies as a "displaced person" under the facts of this case.

The Department of Housing and Urban Development (HUD) provided funds for the Norfolk Redevelopment and Housing Authority (NRHA) to carry out certain redevelopment projects in Norfolk, Virginia. In

order to carry out these projects NRHA acquired title to certain blighted areas in Norfolk. Because of these projects, C&P was forced to move certain of its telephone lines, cables, conduits, poles and related equipment from what had been streets in Norfolk. Under C&P's franchise agreement with the City of Norfolk, C&P was required to move its lines from public rights-of-way whenever requested by the city to do so.

After moving its lines, C&P requested relocation benefits under the Uniform Relocation Act. C&P's claims were denied at the administrative level. C&P then brought this action in the district court against the Secretary of HUD and NRHA.

After a trial on the liability issue, the district court determined that Congress did not intend for utilities to qualify as displaced persons under the Act. The plaintiff appeals from this order.

I.

The Uniform Relocation Act defines "displaced person" as "any person who... moves... as a result of the acquisition of... real property... for a program or project undertaken by a Federal agency, or with Federal financial assistance...." 42 U.S.C. §4601(6). "Person" is defined as "any individual, partnership, corporation or association." 42 U.S.C. §4601 (5). "Business" is defined as "any lawful activity, excepting a farm operation, conducted primarily - - (A) for the purchase, sale, lease and rental of personal and real property, and for the manufacture, processing, or marketing of products, commodities, or any other personal property; (B) for the sale of services to the public...." 42 U.S.C. §4601(7). Under 42 U.S.C. §4622(a) "displaced persons" are entitled to recover from the government any reasonable expenses incurred in moving

personal property, and a business required to move is a displaced person.

The plaintiff argues that it is a business within the meaning of the Act and thus is entitled to claim reimbursement for expenses as a displaced person. NRHA and HUD argue, however, that the Act was not intended to apply to utilities. HUD bases its argument on the settled common law principle that utilities are not entitled to reimbursement for expenses incurred in moving lines when cities close streets. Because the Act does not explicitly mention utilities as parties that can receive benefits under the Act, and because the legislative history of the Act makes no mention of utilities, HUD argues that the Act was not intended to change the common law. We disagree.

HUD's reliance on the common law is unconvincing. The Act was intended to create rights that were not recognized at

common law. A tenant at will, for example, can recover relocation expenses as a displaced person under the Act even though the common law recognized no such right. The plaintiff in this case is, in certain respects, similar to a tenant at will because it has a right to use the city's streets for its lines only at the will of the city.

Congress' failure to mention utilities during the debates on the Act and in the legislative history of the Act also provides little reason to exclude utilities from the Act's coverage. In Alexander v. United States Department of Housing and Urban Development, 441 U.S. 39, 51 (1979), the Supreme Court noted that the original "Declaration of Policy" in S.1, 91st Cong., 1st Sess. §201(1969), the bill finally enacted as the Uniform Relocation Act, stated that the purpose of the legislation was

> "to establish a uniform policy for the fair and equitable treatment of owners, tenants, and others displaced by the acquisition of real property in Federal and federally assisted programs to the end that such person shall not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole."

Similar language is contained in the House Report, H.R. 91-1656 (1970). Thus the Act was intended to extend benefits uniformly to persons who are displaced by federal acquisitions of real property for federal programs. Exclusion of utilities from the Act's coverage would run counter to that purpose.

In the absence of any clear legislative intent to exclude utilities, it is this court's duty to apply the literal language of the statute. Doing so, we find that a utility comes within the Act's definition of "business" and thus

is a "displaced person" under the Act.

II.

HUD contends that the removal of its lines by C&P was not the result of federal acquisition of the real estate. It says that the removal was required by the city's closure of the streets.

Under the statute, relocation expenses are payable if the removal was required "as a result of the acquisition of... real property, in whole or in part..., for a program or project undertaken by a Federal agency, or with Federal financial assistance...." It is true that the city closed the streets, but the removal seems clearly to have been required as a result of the federal acquisition of the real estate.

With respect to most of the relocation costs incurred by C&P, they occurred in situations in which NRHA acquired the land abutting both sides of streets. As

a result of those acquisitions, the project became the owner of the title in fee simple to the land underlying the streets, subject to the city's easement to maintain them as public ways. At the request of NRHA, the city then released its easements so that NRHA became the owner of the land formerly dedicated to use as streets without the burden of that servitude. While in a very technical sense it may have been the city that closed the streets, the city was acting at the direction or request of HUD and NRHA. It was an essential part of the plan of the project that the land occupied by the streets to be closed be acquired free of the city's easement so that such land could be incorporated in the redevelopment plan to the same extent as lands acquired, by purchase or condemnation, from private owners. It was the federal acquisition of the streets, an integral part of the redevelopment plan,

which required removal of C&P's lines.

Some of the removal expense was incurred with respect to lines in streets that were to be widened and other streets which were only partially closed. The record is not sufficient to permit us to decide whether those expenses resulted in whole or in part from the federal acquisition. This should be the subject of further consideration on remand.

III.

Under 42 U.S.C. §4622(a), it is the expense of removal of personal property which is reimbursable, and HUD contends that the utility lines were realty. Its regulations require that what is personal property be determined according to the law of the state in which the property is located,[1] and it relies upon Transcontinental Gas Pipe Line v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757,

1. 24 C.F.R. §42.40(m)(2).

761-62(1970).

In Transcontinental, gas pipe lines had been installed in land in which Transcontinental had a perpetual easement for the placement, maintenance and operation of the gas line. The easement was unquestionably real property, belonging to the owner of the lines. Under those circumstances, the Virginia Supreme Court held that the gas lines themselves were real estate belonging to Transcontinental. In so doing, it held that the question whether a chattel annexed to real estate has been converted into a fixture principally depends upon the intention of the party making the annexation.

C&P, in placing its lines, could hardly have intended them to become so annexed to real estate belonging to others that the lines themselves became the real property of those other owners. Clearly it intended to maintain ownership and control of these lines which were not

annexed to any real estate owned by C&P of which they might have become a part. Indeed, everyone recognized C&P's right of removal of property which could only have been its personalty.

In similar situations in which a utility's facilities were installed or attached to real estate belonging to others, state courts have found that the facilities remained personal property. See Bangor-Hydro Electric v. Johnson, 226 A.2d 371 (Me. 1967); United Electric Light v. Deliso Const. Co., 52 N.E.2d 353 (Mass. 1943).

HUD and NRHA, however, point to a letter that C&P wrote to the Virginia Commissioner of Revenue requesting that its property be taxed as real property. That it wished its facilities to be treated for purposes of ad valorem taxation as if they were realty is not inconsistent with an intention at the time of

installation that the facilities remain its personal property subject to its control and possible removal. Indeed, if the facilities had become part of the real estate to which they were attached, C&P should have been subject to no ad valorem taxation upon them, for they would not have been the property of C&P.

This result is consistent with the purpose of the personal property limitation. The former owners of land acquired for the redevelopment project are compensated through a purchase agreement or a condemnation proceeding. By agreement, there might be a severance of a fixture and its reconversion to personalty, but once real estate has been sold and paid for, it is no longer subject to removal by the former owner. The Act thus contemplates no reimbursement of expense in connection with the removal of non-removable real estate. It is limited to the expense

of removal of personal property, for the owner is not otherwise compensated for that expense. There is no possibility of double compensation here, for C&P did not sell any land, and it received no compensation through any sale or condemnation.

IV.

We reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

THE CHESAPEAKE AND POTOMAC
TELEPHONE COMPANY OF VIRGINIA,

Plaintiff

v.

CIVIL
ACTION
NO. 79-906-N

MOON LANDRIEU, ETC., and
NORFOLK REDEVELOPMENT AND
HOUSING AUTHORITY,

Defendants

MEMORANDUM OPINION

The Chesapeake and Potomac Telephone Company of Virginia ("Telephone Company") here sues the Secretary of Housing and Urban Development ("HUD") and Norfolk Redevelopment and Housing Authority ("NRHA"), seeking reimbursement for the relocation of its telephone lines, cables, conduits, poles, and related equipment in

four federally-aided redevelopment projects in the City of Norfolk, Virginia. The central issue is the applicability of the provisions of the Federal Relocation Assistance Act, also known as the Uniform Relocation Act of 1970 ("URA"), 42 U.S.C. §§4601 et seq. The Virginia Legislature has adopted an enabling act to bring Virginia localities under the umbrella of the federal Uniform Relocation Act. See, §§25-235 et seq., Code of Virginia.

It is stipulated that the defendant NRHA acquired title to certain blighted areas in Norfolk for the purpose of redevelopment projects; that the land so acquired included streets in which the Telephone Company's lines and conduits were located; and that in the redevelopment of the areas the Telephone Company was required to relocate its utility equipment in accordance with the plan established for the redevelopment of

each pertinent area.

The statutes relied upon in the Telephone Company complaint are part of the Federal Relocation Assistance Act, 42 U.S.C. §§4601, 4622 and 4637, and read as follows:

> "4622. (a) Whenever the acquisition of real property for a program or a project...will result in the displacement of any person...the head of such agency shall make a payment to any displaced person...for - (1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property; (2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property....
>
> "§4601. Definitions. As used in this chapter -
>
> (5) The term 'person' means any individual, partnership, corporation or association.

> (6) The term 'displaced person' means any person who...moves from real property, or moves his personal property from real property as a result of the acquisition of such real estate, in whole or in part, or as a result of the written order of the acquiring agency to vacate such real property, for a program or a project ....
>
> (7) The term 'business' means any lawful activity, excepting a farm operation conducted primarily -
>
> (a) for the sale of services to the public....
>
> "§4637. A person who moves or discontinues his business, or moves other personal property...as a direct result of any project or program...shall...be deemed to have been displaced as a result of the acquisition of real property."

HUD and NRHA, defendants, deny that the Uniform Relocation Assistance Act includes public utilities such as the Telephone Company or that the statutes are to be given the broad reading necessary to encompass the plaintiff's claim.

Concluding that utilities are not

included under the Uniform Relocation Act of 1970, we DENY the Telephone Company's request for reimbursement thereunder.

I

In the litigation of situations reasonably akin factually to those presented here, courts have been unanimous in denying such utility relocation claims. Consumer Power Company v. Costle, 615 F.2d 1147 (6th Cir. 1980), held that relocation benefit for a gas main which had to be relocated in a new right-of-way in a redevelopment project was denied; Pacific Telephone and Telegraph v. Redevelopment Agency of Glendale, 151 Cal. Rptr. 68, 87 Cal. App. 3d 296 (1978), under a State Act of the same language as the federal Relocation Act, the court found that a public utility accepts franchise rights

in public streets subject to an implied obligation to relocate those facilities at its own expense when necessary to make way for a redevelopment project relieving urban blight. Artesian Water Co. v. State Department of Highways and Transportation, 330 A.2d 432 (Del. 1974), held that the Uniform Relocation Act was not intended to extend coverage to include utilities within its definition of displaced persons or businesses. Mountain States Telephone and Telegraph Company v. Boise Redevelopment Agency, 607 P.2d 1084, 101 Idaho 30 (1980), stated that the overwhelming view in this country is that public utilities are not entitled to relocation costs incurred in making way for governmentally sponsored projects and the Uniform Relocation Act does not change this common law rule. To like effect, Public Service Company of Oklahoma v. Harris, No. 79-C-37-3T (N.D. Okla, August 22, 1980);

Lone Star Gas Company, etc. v. Moon Landrieu, No. 80-100-C (E.D. Okla., March 30, 1981).

These cases are ample authority, upon almost identical factual situations and with the same state and federal statutory overview that a private utility company is not a beneficiary for relocation expenses under the Uniform Relocation Act of 1970.

II

The common law has long been fully developed that utilities, shielded from competition by a franchise, accept their right to install utility lines in public rights-of-way thoroughly cognizant of their obligation to relocate such lines upon demand at no cost to the City, County or State. No authority for this obligation need be cited.

In Virginia during the period of the conception of the Uniform Relocation Act, the mid-1960's, relocation costs of utility lines, particularly in the expansion of highways, raised a real furor of intense and vocal interest both to the utilities attempting to collect reimbursement and to the Virginia Highway Department in its disclaimer of liability for such costs. Potomac Electric Power Company v. Fugate, 275 F.Supp. 566 (E.D. Va. 1967); PEPCO v. Highway Commissioner, 211 Va. 745, 180 S.E.2d 657 (1971); Potomac Power Electric Power Company v. Fugate, 341 F.Supp. 887 (1972); Potomac Elec. Power Co. v. Fugate, 574, F.2d 1163 (4th Cir. 1978). This contest was and is part of the public record and was prominently and contemporaneously in the foreground while passage of the relocation Act of 1970 was before Congress.

In the adoption of the Uniform Relocation Act of 1970 if Congress chose to abrogate such a well known common law principal, it would certainly have included in that legislation a clear affirmative statement of that revocation. Instead, no such reversal of the common law concept appears in the language of the Act nor its legislative notes and history. So also, in light of then ongoing litigation over relocation costs, had it been the intent of Congress to reimburse utilities for relocation costs in redevelopment projects, it appears that such intent most certainly would have been specifically stated in light of the fact that Congress had passed a special statute, the Federal Highway Aid Act in 1958, to give such relief to utilities relocating lines to accommodate the interstate highway system.

Lastly, public utilities retrieve their operating costs and the reasonable return on their investment from the general public in their franchise area through rates that are structured to accommodate costs and expenses. No other "persons," "corporations," or "displaced persons," except utilities are so protected by a franchise with a non-competitive market area.

The language of the Supreme Court in Alexander v. U.S. Dept. of HUD, 441 U.S. 39 (1979), indicates the thoroughness of the discussion of the Relocation Act before both the House of Representatives and the Senate Committee. Apparently, many witnesses appeared seeking to enlarge the umbrella of reimbursement to many classes of "displaced persons." No mention is made of any appearances before the Committees of Congress by utility representatives. In the end, as Alexander pro-

claims, the extension of relocation assistance was limited to a fairly narrow group and did not include utilities.

> "The structure of the Relocation Act confirms our conclusion that Congress did not expect to provide assistance for all persons somehow displaced by Government programs." Alexander, supra at page 60.

We believe that it is those unprotected, unfranchised corporations and persons which were contemplated by Congress under the Uniform Relocation Act. A utility company, C & P Telephone Company, serving these redeveloped areas under its franchise is not called upon to compete. Its rates are established by petitions to the State Corporation Commission which takes into consideration the accounting data essential to the life of the utility and fixes a rate to cover its costs and expenses. On the other hand, a Mom and Pop business, a grocery store, a retail

furniture outlet, for instance, which is subjected to the sudden trauma of being forced to relocate elsewhere must do so under competitive conditions in which it cannot realistically raise the price of its products to cover extraordinary relocation costs. It must compete in the market place against competitors beyond the redeveloped area who have no such cost to recoup. These are the "persons," "businesses," "displaced persons," to which the Uniform Relocation Assistance Act extends its largesse.

For the reasons herein stated, the plaintiff's prayer for relief is DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia
June 4, 1981.